No. 02-361

Supreme Court, U.S.
FILED
OCT 7 2002
CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,
Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM OF APPELLEES AMERICAN LIBRARY ASSOCIATION, ET AL.

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October 7, 2002

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QUESTIONS PRESENTED

1. Whether the Children's Internet Protection Act (CIPA) induces public libraries to violate the First Amendment.

2. Whether CIPA imposes unconstitutional conditions on funding to public libraries and their patrons in violation of the First Amendment.

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Appellees American Library Association, *et al.*, respectfully submit this response to the government's jurisdictional statement.[1] As shown below, the provisions of the Children's Internet Protection Act ("CIPA") that condition federal funding to public libraries on the installation and use of content blocking software on all library Internet terminals violate the First Amendment. Although the Act purports to be confined to unprotected expression, the district court's extensive factual findings – which the government barely acknowledges in its jurisdictional statement – establish that any library attempting to comply with CIPA would end up blocking access to vast amounts of protected speech. The Web sites blocked include both (1) sexually explicit but non-obscene sites that the filtering companies intend to block and (2) thousands of other Web pages that do not even remotely resemble the expression the companies say they are targeting. Because of the rapid growth and dynamic nature of the Internet and the systemic shortcomings of the filtering process, blocking software is inherently incapable of avoiding both kinds of "overblocking." Moreover, as the district court found, libraries have available options for managing public Internet access that are much less restrictive than mandatory blocking – and just as effective at serving any legitimate governmental interest at stake.

Based on these facts, the district court correctly concluded that CIPA induces public libraries to violate the First

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[1]Appellees joining this brief are: American Library Association, Inc.; Freedom to Read Foundation; Alaska Library Association; California Library Association; New England Library Association; New York Library Association; Association of Community Organizations for Reform Now; Friends of the Philadelphia City Institute Library; Pennsylvania Alliance for Democracy; Elizabeth Hrenda; and C. Donald Weinberg ("ALA Appellees"). Pursuant to Rule 29(6) of this Court, ALA Appellees state that there is no parent or publicly held company owning 10% or more of any ALA Appellee.

Amendment rights of patrons, rendering this funding statute invalid under *South Dakota v. Dole*, 483 U.S. 203 (1987). In addition, as suggested but not conclusively decided by the district court, CIPA's funding restrictions impose an unconstitutional condition on public libraries and their patrons that distorts the usual functioning of libraries that choose to offer the uniquely diverse medium of the Internet.

For these reasons, the district court's judgment was plainly correct and should, in our view, be summarily affirmed. Nevertheless, appellees appreciate that this case raises important constitutional questions regarding Congress's latest attempt to restrict speech on the Internet. The Court may therefore prefer to note probable jurisdiction and undertake a more comprehensive examination of the First Amendment implications of the "technology protection measures" required by CIPA. We respond here to appellants' criticisms of the district court's decision, in order to assist the Court in making that determination.

STATEMENT

A. The Statutory Framework

CIPA profoundly alters two pre-existing federal funding schemes: Library Services and Technology Act ("LSTA") grants, *see* 20 U.S.C. § 9101 *et seq.*, and the FCC-administered "universal service" or "E-rate" program, *see* 47 U.S.C. § 254(h). As the government and the district court's decision recognize, both programs have contributed significantly to the increased availability of Internet access in public libraries, especially in low-income communities. *See* J.S. at 3; J.S. App. 4a, 36a. Prior to the enactment of CIPA, neither the LSTA program nor the E-rate discount scheme imposed conditions or restrictions on the content of the Internet access funded by those programs.

CIPA requires public libraries to install and use content blocking software on all library Internet terminals as a condition of receiving LSTA and E-rate funds. Under the provisions challenged by plaintiffs and invalidated by the district court,[2] a public library receiving federal Internet funding under the LSTA or E-rate programs must install and use Internet blocking software on "*any* of its computers with Internet access," 20 U.S.C. §§ 9134(f)(1)(A)(i), 9134(f)(1)(B)(i) (for LSTA) (emphasis added); 47 U.S.C. §§ 254(h)(6)(B)(i), 254(h)(6)(C)(i) (for E-rate) (emphasis added), "during *any use* of such computers," 20 U.S.C. §§ 9134(f)(1)(A)(ii), 9134(f)(1)(B)(ii) (for LSTA) (emphasis added); 47 U.S.C. §§ 254(h)(6)(B)(ii), 254(h)(6)(C)(ii) (for E-rate) (emphasis added). This sweeping requirement covers not only adult and minor patrons, but also library staff. *See In re Federal-State Joint Board on Universal Service*, 16 F.C.C.R. 8182, ¶ 30 (2001). CIPA's mandate, moreover, is not limited to federally funded computers or Internet access. Rather, if a public library receives any LSTA or E-rate Internet funding, however small, *all* of the library's Internet access falls within the Act's ambit. The blocking software must be designed to prevent access to obscenity, child pornography, and, for minor patrons, speech that is "harmful to minors." 20 U.S.C. § 9134(f)(1); 47 U.S.C. § 254(h)(6).

CIPA does contain several disabling provisions that permit libraries to disable the software "to enable access for bona fide research or other lawful purposes." 20 U.S.C. § 9134(f)(3); 47 U.S.C. § 254(h)(6)(D). But the Act does not *require* libraries to disable under those circumstances, nor does it define or provide any additional guidance explaining the terms "bona fide research" or "other lawful purposes."

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[2]Plaintiffs did not challenge, and the district court did not address, CIPA's restrictions on public school Internet funding.

B. Evidence Available to Congress

When Congress passed CIPA in 2000, it did not act on the basis of evidence that blocking software is an effective response to concerns about patrons' access to unprotected speech in the library setting. Contrary to the suggestion made in appellants' jurisdictional statement, *see* J.S. at 3-4, Congress had no evidence that blocking software works as advertised, let alone as CIPA requires. In fact, the only federally sanctioned study of blocking software at the time – a report by the federal Commission on Child Online Protection ("COPA Commission Report") – declined to endorse the mandatory use of blocking software, concluding that "no single technology or method will effectively protect children from harmful material online." COPA Commission Report, Oct. 20, 2000, at 9; *see also, e.g.*, *id.* at 19-20, 21, 22 (concluding that blocking technology "raises First Amendment concerns because of its potential to be over-inclusive in blocking content," and that "[c]oncerns are increased because the extent of blocking is often unclear and not disclosed"). Indeed, far from acting on the basis of evidence, Congress in CIPA mandated that the National Telecommunications and Information Administration *begin* evaluating blocking software eighteen months *after* the enactment of CIPA. *See* CIPA, Pub. L. No. 106-551, Div. B., Tit. XVII, 114 Stat. 2763A-335, § 1703.

C. The Three-Judge District Court's Decision

The district court's conclusion that CIPA's requirements violate the First Amendment was based on the court's extensive findings of fact, made after a two-week trial during which the court heard from twenty witnesses and received voluminous exhibits. Those findings, which the government largely ignores, establish that any available filtering software a library might install would block an enormous amount of protected

expression and that such speech restrictions cannot be justified as necessary to serve any compelling governmental interest.

1. *Ineffectiveness of filtering software.* The government does not dispute that blocking software is the only real option available to libraries seeking to comply with CIPA. Once installed on a library's computer network, filtering software will prevent patrons from viewing a Web page if that page is included on the software's pre-established list of pages or sites to be blocked. Those lists, in turn, include a large number of sites that do not match the categories of expression supposedly targeted by CIPA – *i.e.*, obscenity, child pornography, and (for children) "harmful to minors" materials. The district court found that "no category definition used by filtering software companies is identical to CIPA's definitions of visual depictions that are obscene, child pornography, or harmful to minors." J.S. App. 51a. Instead, the companies simply attempt to block sites that are sexually explicit.

Moreover, even leaving aside the complete lack of any relationship to the legal categories of unprotected speech listed in CIPA, the district court found that blocking software is wholly ineffective *on its own terms*. Based on extensive testimony about how filters work and on studies of filters' accuracy, the district court found that blocking software is plagued by problems of significant "overblocking" of Web content that does not meet the filter's categories. Blocking software also produces "underblocking," in that it fails to block substantial amounts of material that would fall within the filter's categories. *See, e.g.*, *id.* 3a. The district court found that these flaws inhere in the nature of the Web and the way in which filtering companies compile their blocked sites lists. "[I]t is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture, and given the state of the art of automated classification systems, to develop a filter

that neither underblocks nor overblocks a substantial amount of speech." *Id.* 68a.

In so finding, the district court credited testimony of experts presented by both sides, who demonstrated the myriad flaws endemic to filtering software. As the court noted, the government's *own* expert study of the use of blocking software in three libraries, although skewed to underestimate the rate of overblocking, showed an overblocking rate of up to 15% – *i.e.*, 15% of the Web sites that patrons tried to access but were blocked did not meet the filtering companies' own category definitions. *See id.* 72a-73a, 78a-79a. The district court also credited plaintiffs' expert study identifying thousands of pages that were blocked by currently available software but would be of use or value in a public library. *Id.* 68a. In summarizing its evaluation of the expert reports, the district court stated:

> The inaccuracies that result from these limitations of filtering technology are quite substantial. At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs evaluated by experts in this case, even when considered against the filtering companies' own category definitions. Many erroneously blocked pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as "pornography" or "sex."
>
> The number of overblocked sites is of course much higher with respect to the definitions of obscenity and child pornography that CIPA employs for adults, since the filtering products' category definitions, such as "sex" and "nudity," encompass vast amounts of Web pages that are neither child pornography nor obscene.

Id. 93a.[3]

2. *The Internet in the public library.* The district court also made a number of key factual findings concerning the traditional role and current practices of public libraries, and the manner in which libraries offer Internet access to their patrons.

As the district court found, public libraries "generally share a common mission – to provide patrons with a wide range of information and ideas." *Id.* 32a. That mission is not restricted to "education," *see* J.S. at 3, 14-15, but rather, "[p]ublic libraries provide information not only for educational purposes, but also for recreational, professional, and other purposes." J.S. App. 33a. Indeed, the government concedes that libraries "serve broader community interests" by providing materials to their patrons that go far beyond educational materials. J.S. at

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[3]The thousands of Web pages that the district court found "no rational person could conclude match[] the filtering companies' category definitions," J.S. App. 93a, are too numerous to list here, but include, for example: "Orphanage Emmanuel, a Christian orphanage in Honduras that houses 225 children," blocked by Cyber Patrol in the "Adult/Sexually Explicit" category; "Vision Art Online, which sells wooden wall hangings for the home that contain prayers, passages from the Bible, and images of the Star of David," blocked in Websense's "Sex" category; "the home page of the Lesbian and Gay Havurah of the Long Beach, California Jewish Community Center," blocked by N2H2 as "Adults Only, Pornography," by Smartfilter and Websense as "Sex"; the Web site for Bob Coughlin, a town selectman in Dedham, Massachusetts," blocked under N2H2's "Nudity" category; "the Web site for Wisconsin Right to Life," blocked by N2H2 blocked "Nudity"; "the Western Amputee Support Alliance Home Page," blocked by N2H2 as "Pornography"; "the Web site of the Willis-Knighton Cancer Center, a Shreveport, Louisiana cancer treatment facility," blocked by Websense under the "Sex" category; "and a site dealing with halitosis," blocked by N2H2 as "Adults, Pornography," by Smartfilter as "Sex," by Cyber Patrol as "Adult/Sexually Explicit," and by Websense as "Adult Content"; and "Southern Alberta Fly Fishing Outfitters," blocked by N2H2 as "Pornography." *Id.* 86a-89a.

14. To that end, individual libraries not only provide as much information as their resources and space will allow, but also draw upon the collections of other libraries through an extensive interlibrary loan system. *See* J.S. App. 34a.

Consistent with their mission to widen the world of information available to patrons, "approximately 95% of all public libraries provide public access to the Internet." *Id.* 37a (citation omitted). As the district court recognized, "[p]ublic libraries play an important role in providing Internet access to citizens who would not otherwise possess it. Of the 143 million Americans using the Internet, approximately 10%, or 14.3 million people, access the Internet at a public library." *Id.* 36a. Access to the Internet through the public library is particularly important for people with lower incomes: "About 20.3% of Internet users with household family income of less than $15,000 per year use public libraries for Internet access." *Id.* 36a-37a. Public funding thus is of critical importance to ensuring that people from all income levels have access to the Internet, as reflected in the fact that "[a]pproximately 70% of libraries serving communities with poverty levels in excess of 40% receive E-rate discounts." *Id.* 37a.

The district court found that the vast majority of libraries employ less restrictive measures to ensure that patrons do not access illegal speech and to protect children from materials considered harmful to minors. These measures include "channeling patrons' Internet use" by training patrons on use of the Web, and by directing patrons to the library's home Web page which contains links to recommended sites, *id.* 41a; shielding computer screens from the view of passersby through physical positioning of the terminals, and through the use of privacy screens and recessed monitors, *id.* 42a-43a; ensuring the enforcement of library Internet use policies by placing computer terminals in well-trafficked areas, *id.* 42a-44a;

segregating computers used by children, *id.* 44a; offering the optional use of blocking software, *id.* 45a; and allowing parents to decide whether their children will use terminals with blocking software, *id.*

3. *The district court's legal conclusions.* Based on its findings about the role of public libraries in providing Internet access, and the inherent flaws of filtering software that result in the wrongful blocking of a substantial amount of protected speech, the district court concluded that CIPA would induce public libraries to violate the First Amendment rights of their patrons, and thus does not constitute a valid exercise of Congress's spending power under *South Dakota v. Dole*, 483 U.S. 203 (1987). The court held that CIPA was not narrowly tailored to the government's purported compelling interest in protecting library patrons from directly or inadvertently viewing images that are obscene, child pornography, or, in the case of patrons under 17, harmful to minors. J.S. App. 148a-157a. The court also determined that the government failed to carry its heavy burden of demonstrating the absence of any other less restrictive alternatives to mandatory filtering. Indeed, evidence at trial showed that most libraries employ a wide variety of less restrictive methods for serving the government's asserted interests. *Id.* 157a-167a.

The court also rejected the government's argument that any constitutional infirmities were cured by the Act's disabling provisions. *Id.* 167a-177a. To the contrary, the district court held that CIPA's requirement that patrons seek librarians' permission to view material on the Internet was in itself unconstitutional under this Court's decisions in *Lamont v. Postmaster General*, 381 U.S. 301 (1965) and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). J.S. App. 170a-171a. Finally, although finding it unnecessary for its holding invalidating CIPA, the

district court observed in a lengthy footnote that plaintiffs "have a good argument that CIPA's requirement that public libraries use filtering software distorts the usual functioning of public libraries in such a way that it constitutes an unconstitutional condition on the receipt of funds." *Id.* 180a-188a n.36.

REASONS TO AFFIRM

I. THE DISTRICT COURT'S DECISION THAT CIPA VIOLATES THE FIRST AMENDMENT RIGHTS OF LIBRARY PATRONS AND THEREFORE CANNOT BE SUSTAINED AS A VALID EXERCISE OF CONGRESS'S SPENDING POWER SHOULD BE AFFIRMED.

As the government concedes, the district court properly analyzed CIPA under the framework established in *South Dakota v. Dole*, 483 U.S. 203 (1987). Under *Dole*, when Congress distributes funds to state and local government entities, it cannot do so in a way that "induce[s] [those entities] to engage in activities that would themselves be unconstitutional." *Id.* at 210. The district court concluded that CIPA was facially invalid because it would require public libraries receiving federal funds to violate the First Amendment rights of their patrons. As the court explained, "[b]ecause of the inherent limitations in filtering technology, public libraries can never comply with CIPA without blocking access to a substantial amount of speech that is both constitutionally protected and fails to meet even the filtering companies' own blocking criteria." J.S. App. 102a. That holding, which is based on extensive findings of fact that the government does not challenge, is correct.

A. CIPA Induces Unconstitutional Speech Restrictions on Internet Access in Public Libraries.

1. *CIPA's Restrictions Are Subject to Strict Scrutiny Because They Exclude Protected Speech From a Forum – Internet Access in a Public Library – That Is Dedicated to Free and Open Expression.*

Through CIPA, Congress has inflicted a profound double injury upon the First Amendment. Not only does CIPA unduly restrict the most diverse, expansive medium ever created, it also compounds the problem by regulating that medium in one of the most democratizing, speech-enhancing institutions in America – the public library. By targeting the intersection of these two First Amendment fora, CIPA ultimately weakens both, severely undermining the core constitutional values otherwise enhanced by the provision of Internet access in public libraries. CIPA's restrictions are subject to strict scrutiny because the law singles out for prohibition one type of speech in an otherwise unlimited forum for the exchange of ideas.[4]

a. As the district court recognized, strict scrutiny is especially warranted because CIPA regulates a forum that lies at the intersection of two institutions devoted to the promotion

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[4]The government acts as if appellees assert only the speech rights of Web publishers. *See* J.S. at 17. Certainly, CIPA infringes on those rights. But this case fundamentally involves the right of library patrons to receive information on the Internet. It is well settled that the First Amendment encompasses not only the right to speak but also the right to receive information. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997) (invalidating statute because it "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another"); *Board of Education v. Pico*, 457 U.S. 853, 867-68 (1982) (plurality opinion) ("[T]he right to receive ideas follows ineluctably from the sender's First Amendment right to send them.").

of First Amendment values. *See id.* 10a, 128a-129a. First, the Internet is a unique, expansive medium for worldwide communication. "While 'surfing' the World Wide Web . . . individuals can access material about topics ranging from aardvarks to Zoroastrianism." *Ashcroft v. ACLU*, 122 S. Ct. 1700, 1703 (2002). The Internet presents low entry barriers, allowing almost anyone to communicate with a worldwide audience. J.S. App. 25a. Currently, at least 400 million people use the Internet worldwide, including over 143 million Americans. *Id.* As the Court recognized in *Reno v. ACLU*, 521 U.S. 844 (1997), expression on the Internet is "as diverse as human thought," *id.* at 870, and "is thus comparable, from the reader's viewpoint, to . . . a vast library including millions of readily available and indexed publications," *id.* at 853. Given the virtually boundless potential of expression on the Internet, "[t]his dynamic, multifaceted category of communication" is entitled to the highest level of First Amendment protection, without qualification. *Id.* at 870, 872.

Second, public libraries serve as a forum for the communication and receipt of information and the free exchange of ideas. Indeed, the public library, by its very nature, is "designed for freewheeling inquiry." *Board of Education v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting). "As such, the library is a 'mighty resource in the free marketplace of ideas.'" J.S. App. 128a (quoting *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976)). As much as any institution, the public library has safeguarded the vital First Amendment right to receive speech and expression. In defining its purpose as information-provider, the public library historically has offered a wide and diverse range of expression to the public and has prohibited exclusion of materials based on disfavored content or viewpoints.

b. In providing Internet access to its patrons on free and equal terms, the public library furthers its speech-disseminating mission by opening its doors to a vast, boundless forum for expression. Having created such an unlimited forum, the government cannot exclude certain types of Web content without satisfying strict scrutiny. *See, e.g., International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (a designated public forum is "property that the State has opened for expressive activity by part or all of the public," and "[r]egulation of such property is subject to the same limitations as that governing a traditional public forum"); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (explaining that once a government has opened up a forum for expressive activity, it may not exclude certain types of content without satisfying strict scrutiny); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (holding that town violated First Amendment when it refused to allow group seeking to perform the musical "Hair" access to a municipal public theater). As the district court put it, "Where the state provides access to a 'vast democratic forum[],' *Reno v. ACLU*, 521 U.S. 844, 868 (1997), open to any member of the public to speak on subjects as 'diverse as human thought,' *id.* at 870 (internal quotation marks and citation omitted), the state's decision selectively to exclude from the forum speech whose content the state disfavors is subject to strict scrutiny, as such exclusions risk distorting the marketplace of ideas that the state has facilitated." J.S. App. 10a.

The government argues that libraries can merely define the forum of Internet access to exclude one type of content – sexually explicit speech – without violating the Constitution. *See* J.S. at 17-18. That argument flies in the face of fundamental First Amendment principles, which make clear that once the government dedicates a forum to a general, speech-promoting use – in this case, the communication and

receipt of the broadest spectrum of information – it cannot limit that use by disfavoring certain expression. *See, e.g.*, *Perry*, 460 U.S. at 46.

CIPA's extensive, federally mandated incursion into the libraries' speech-enhancing function necessarily undercuts the institutions' primary purpose. CIPA's blocking mandate is particularly harmful in light of the crucial role libraries have played in making the extensive resources of the Internet available to the public. As the district court found, over 14 million people in the United States use the public library for Internet access, and of those, a disproportionate number are low-income. J.S. App. 36a-37a, 130a-131a n.26. "By providing Internet access to millions of Americans to whom such access would otherwise be unavailable, public libraries play a critical role in bridging the digital divide separating those with access to new information technologies from those that lack access." *Id.* 130a-131a n.26.

c. The government struggles to explain why, in its view, CIPA's selective exclusion of one type of speech from otherwise unfettered Internet access at the public library is not subject to any heightened scrutiny. In the district court, the government conceded that "the physical space of the library is itself a public forum," Defs.' Post-Trial Br. at 21, but argued that the library's provision of information via the Internet somehow *limits* the speech-enhancing nature of the library forum, *id.* at 18-26. In a notable reversal of strategy, the government now concedes that the *Internet* is a public forum subject to strict scrutiny, J.S. at 19, but claims that when a public library "brings Internet content into the library," *id.*, that somehow transforms the Internet into a nonpublic forum. The government's legal about-face merely serves to underscore the weakness in both versions of its argument that CIPA is immune from constitutional scrutiny.

Faced with the undeniably speech-enhancing nature of the Internet and the public library's indisputable status as a forum for freewheeling inquiry, the government has sought to cast CIPA's blocking mandate as somehow analogous to classic library collection development decisionmaking. That analogy fails for several reasons. As an initial matter, librarians have absolutely no involvement in the blocking decisions made by third-party blocking software companies. Those decisions are made by non-librarians who know nothing of a library's existing physical collections, the communities served by libraries, or the criteria used by librarians in selecting physical materials. In fact, because the software companies treat their blocking lists as proprietary and refuse to provide those lists to customers, J.S. App. 51a, libraries installing blocking software do not even know what Internet information they are withholding from the public. Moreover, in providing access to the Internet, libraries necessarily provide patrons with innumerable Web sites that they would never include in their physical collections. As a result, libraries that offer Internet access cannot be said to be exercising the type of editorial discretion they make when selecting materials for their print collection.[5]

The government's analogy fails for the additional reason that blocking Internet access involves an active, rather than passive exclusion of certain types of content. Because an Internet connection provides immediate access to the entire

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[5]To the extent classic collection development principles have any application in the Internet context, it is only through the selection of "recommended sites," which many libraries offer as a means of directing patrons to particularly useful or interesting Internet information. *Id.* 41a-42a. The government's suggestion that these lists of recommended sites resemble the traditional selection of physical materials in libraries is correct, but its argument that by recommending certain sites public libraries exercise editorial discretion over the entire Internet is illogical. *See* J.S. at 17-18.

Internet so "no appreciable expenditure of library time or resources is required to make a particular Internet publication available" and indeed "a library must actually expend resources to restrict Internet access to a publication that is otherwise immediately available," the blocking of Internet sites mandated by CIPA is akin to a library's purchasing an encyclopedia or a magazine and tearing out or redacting some of its content. *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 2 F. Supp. 2d 783, 793-94 (E.D. Va. 1998). When a library declines to carry a book in hard copy as part of a necessarily selective acquisition process (given shelf space and resource constraints), it conveys no discernable message about the content of that book. When a Web site is blocked on the library's Internet terminals pursuant to a content-based policy, however, the library (through a software company) lets patrons know that it expressly disfavors the site's content.

In sum, a library providing broad Internet access opens a window to an enormous amount of information not otherwise available in the library's physical collection. When doing so, the library cannot, consistent with the First Amendment, selectively close that window to one type of disfavored content.

2. *CIPA's Requirement that Libraries Install Mandatory Blocking Software to Enforce a Content-Based Restriction on Speech Is Not Narrowly Tailored to Serve a Compelling Government Interest.*

As a content-based regulation on speech, CIPA is presumptively invalid. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000). The government bears the burden of demonstrating that the law

satisfies strict scrutiny. *Id.* at 816.[6] In this case, it was unable to satisfy that burden.

a. As the district court's factual findings make clear, CIPA will result in the suppression of a vast amount of Internet content and thus is far from narrowly tailored to serve the government's purported interests. The district court found that "[t]he commercially available filters on which evidence was presented at trial all block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography." J.S. App. 148a-149a. This vast overblocking is due both to the design of blocking software – which is based on content categories far broader than CIPA's and is incapable of blocking visual images without also blocking text – and the significant flaws in the software that result from the inability of blocking software companies to keep up with the enormity of the Web and the inherent tradeoff between over- and underblocking. As the district court found, "any filter that blocks enough speech to protect against access to visual depictions that are obscene, child pornography, and harmful to minors, will necessarily overblock substantial amounts of speech that does not fall within these categories." *Id.* 151a. Not only does blocking software block far more speech than required by CIPA, it also fails to block a

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[6]The presumption against CIPA's content-based distinction is not changed because it targets sexually explicit speech. To the contrary, it is well settled that sexually explicit speech that does not fall within the narrow categories of unprotected expression is entitled to First Amendment protection. *See, e.g., Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1402 (2002) (confirming that speech that is neither obscene nor child pornography is protected by the First Amendment); *Reno*, 521 U.S. at 874-75 ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment.'") (citation omitted).

substantial amount of images that CIPA prohibits. *See id.* 58a. CIPA is thus far from narrowly tailored.

The government simply has failed to justify CIPA's substantial infringement on protected speech. CIPA cannot be justified as a means to prevent inappropriate or criminal behavior in public libraries.[7] "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1403 (2002); *see also id.* at 1399 ("The prospect of crime . . . by itself does not justify laws suppressing protected speech."). Nor is CIPA narrowly tailored to the government's purported interest in preventing patrons from directly or indirectly viewing images that are obscene, child pornography, or harmful to minors. As this Court has emphasized, "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech." *Id.* at 1404; *see also, e.g.*, *United States v. Playboy Entm't Group*, 529 U.S. 803, 817-18 (2000). Likewise, prohibiting adults from viewing sexually explicit speech that is fully protected by the First Amendment cannot be justified because other patrons may find that speech offensive. *See Free Speech Coalition*, 122 S. Ct. at 1399 ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.").[8] Even if that

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[7]As a factual matter, the district court noted that the government had failed to present evidence to support its claim that blocking software is necessary to prevent offensive behavior at the library, and observed that librarians testified that such behavioral problems "have long predated the advent of Internet access." *Id.* 146a.

[8]"[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975).

were a legitimate government interest, it would not justify CIPA's broad censorship of non-sexually explicit speech.

CIPA thus takes a meat ax approach to an area that requires far more sensitive tools. As a result, the law does not even approach the level of narrow tailoring required by the First Amendment. As this Court has explained, "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Error in marking that line exacts an extraordinary cost." *Playboy*, 529 U.S. at 817-18 (internal quotation marks and citation omitted); *see also Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

The government does not challenge the district court's finding that blocking software results in the wrongful blocking of a substantial amount of Web sites, but claims that this represents only a small portion of the Web, and that therefore "a patron will rarely need to obtain access to a site that has been blocked in order to obtain the information he or she seeks at the library." J.S. at 23-24. The government points to absolutely *no* evidence in the record for its assertion that the materials wrongly blocked by filters are otherwise available in books the library may own or elsewhere on the Web. Clearly, many Web sites contain unique expression. And it is no answer to the wrongful censorship of such expression to say that a patron may find similar speech elsewhere. *See, e.g.*, *Reno*, 521 U.S. at 880 ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.") (internal quotation marks and citation omitted); *Conrad*, 420 U.S. at 556 ("[I]t does not matter for purposes of this case that the board's

decision might not have had the effect of total suppression of the musical in the community.").

b. The Act's disabling provisions do not cure the overbroad reach of CIPA's restrictions; to the contrary, they *exacerbate* the statute's constitutional infirmities. As an initial matter, CIPA merely allows, but does not require, library authorities to disable Internet filtering software. *See* 20 U.S.C. § 9134(f)(3) and 47 U.S.C. § 254(h)(6)(D) (providing that authorities "*may* disable the technology protection measure") (emphasis added). Nothing prevents a library authority from denying a disabling request for any reason (or no reason at all), and there are no procedures for an appeal or review of the decision. Accordingly, the disabling provisions fall within the long-disfavored category of statutes that "vest[] unbridled discretion in a government official over whether to permit or deny expressive activity." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755 (1988).

Moreover,, the district court found as a fact that patrons would be unlikely to request unblocking of sites on sensitive topics because of the stigma attached to making such a request. J.S. App. 47a, 171a-73a. The disabling provisions thus impose a chilling effect on requesting library patrons that reinforces CIPA's constitutional failings. *See, e.g., Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 122 S. Ct. 2080, 2089 (2002) (holding that ordinance requiring speakers to surrender anonymity violates First Amendment); *Denver Area*, 518 U.S. at 754 (noting that "written notice" requirement for access to "patently offensive" cable channels "will further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive channel'"); *Lamont v. Postmaster General of the United States*, 381 U.S. 301, 307 (1965) (striking requirement that

recipients of Communist literature notify the Post Office that they wish to receive those materials).

Nor is there a practical way to process unblocking requests anonymously without substantially burdening patrons' right to receive information on the Internet. The district court found that most libraries that used blocking software did not offer a way to request unblocking anonymously, and the one that did took from 24 hours to one week to process the request. J.S. App. 46a, 174a. That delay is itself a substantial burden. *See Watchtower Bible*, 122 S. Ct. at 2090 (ordinance that effectively bans "a significant amount of spontaneous speech" violates the First Amendment).

c. Because CIPA's ban on speech is so wide, and includes a significant amount of Internet speech that is in no way related – much less tailored – to the images CIPA seeks to prohibit, the law fails strict scrutiny even without the existence of less restrictive alternatives. In any event, "[t]he breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as [CIPA]." *Reno*, 521 U.S. at 879. Not only has the government not met that burden, it essentially ignores the numerous alternative methods identified by appellees at trial for satisfying the government's purported interests. As the district court found, these alternatives include the *optional* use of blocking software; policies under which parents decide whether their children will use terminals with blocking software; the use of blocking software only for younger children (either restricted to children's areas or through age identification policies); enforcement of local Internet use policies; training in Internet usage; steering patrons to sites selected by librarians; installation of privacy screens or recessed monitors; and the segregation of unblocked computers or placing unblocked

computers in well-trafficked areas. *See* J.S. App. 41a-45a. In its jurisdictional statement, the government neglects even to address most of these alternatives, and as such fails to prove that they are sufficiently ineffective to justify Congress's decision to require mandatory blocking software everywhere. Based on the significant factual evidence found by the district court, moreover, blocking software itself is of only limited effectiveness at blocking images prohibited by CIPA. The serious questions about the general efficacy of blocking software, and the government's failure to show that the numerous alternatives do not work confirm the government's utter inability to carry its burden of demonstrating that CIPA is the only effective means for serving the government's interest (assuming that interest could ever justify such a broad suppression of speech).

B. CIPA Imposes an Unconstitutional Prior Restraint on Speech in Public Libraries.

CIPA also fails the *Dole* test because it induces public libraries to engage in unconstitutional prior restraints. Although the district court did not reach this issue in striking down the Act, *see* J.S. App. 179a, the prior restraint doctrine provides an alternate ground for affirmance.

CIPA imposes an unlawful prior restraint by silencing speech prior to its dissemination in public libraries, and prior to any judicial determination of the proper level of protection afforded that speech. The Act requires libraries to use technology that, as the district court found, erroneously blocks "countless thousands of Web pages," J.S. App. 91a, including "content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions . . . ," *id.* 93a. CIPA thus induces libraries to restrain massive amounts of

constitutionally protected expression before any patron can receive it.

Moreover, by delegating the authority to restrict speech to third-party software companies who will not reveal what they are blocking, CIPA exacerbates the constitutional infirmities inherent in any prior restraint. The Court rejected a similar delegation of First Amendment decisionmaking authority in *Bantam Books*, which invalidated the "informal censorship" of a "Commission to Encourage Morality in Youth" created to evaluate potentially obscene or indecent materials. *Bantam Books*, 372 U.S. at 66-67, 71. In fact, CIPA extends the problem one step further, by conferring restrictive powers on private companies that refuse to disclose the results of their censorship decisions. Even if filtering companies attempted to conform their blocking decisions to CIPA's three categories – which they plainly do not, *see* J.S. App.51a – CIPA's blocking mandate would be constitutionally intolerable.

II. CIPA IMPOSES UNCONSTITUTIONAL CONDITIONS ON INTERNET FUNDING TO PUBLIC LIBRARIES.

While declining to rule on the plaintiffs' unconstitutional conditions claim, the district court discussed this issue at length in a footnote, suggesting that plaintiffs' claim likely has merit. *See* J.S. App. 180a-188a n.36. Because CIPA imposes unconstitutional conditions on the libraries' receipt of federal and private funds, this claim provides an independent basis for striking down the Act.

As an initial matter, the government focuses on the open question whether libraries, as public entities, have independent First Amendment rights. *See* J.S. at 27 n.6. But while appellees believe that public libraries may assert a First Amendment claim on their own behalf, this determination is unnecessary to the Court's resolution of plaintiffs' claims.

Libraries plainly have standing to assert their patrons' rights. *See, e.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988). In addition, public libraries are best positioned to challenge the use of the federal government's spending power to conscript them into a massive distortion of private communication in an area specifically designed to "encourage a diversity of views." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001); *see also, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995).

Like the spending restrictions invalidated in *Velazquez, Rosenberger*, and *FCC v. League of Women Voters*, 468 U.S. 364 (1984), CIPA imposes unconstitutional restrictions on funding programs "designed to facilitate private speech." *Velazquez*, 531 U.S. at 542; *Rosenberger*, 515 U.S. at 833-34; *League of Women Voters*, 468 U.S. at 383, 392, 395. As noted above, the Internet enables "vast democratic forums," *Reno*, 521 U.S. at 868, creating an unprecedented, free-flowing marketplace of ideas funded, in part, by the two programs covered by CIPA. Through the Act's filtering mandate, "the Government seeks to use an existing medium of expression and control it . . . in ways which distort its usual functioning." *Velazquez*, 531 U.S. at 543.

CIPA's flaws also egregiously distort the usual functioning of public libraries and their ability to determine, on a local level, what information to provide to their communities. Just as the statute struck down in *Velazquez* constrained attorneys in making choices central to the performance of their professional duties, CIPA unduly restricts librarians in exercising basic professional judgments about how and to what extent information and ideas will be made available to the public. In *Velazquez*, the Court facially invalidated a funding condition that required recipients to make one particular

professional choice, the decision not to challenge existing welfare law. Similarly, CIPA unlawfully requires E-rate and LSTA recipients to make one particular professional choice: the decision to mandate blocking software for all patrons. As the Court recently explained, "Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *Playboy*, 529 U.S. at 818.[9]

In addition to the unconstitutional conditions described above, CIPA's restrictions unlawfully cover library Internet access not even subsidized by the federal funding programs. Under the statute, a public library participating in the E-rate or LSTA funding programs must certify that blocking software operates on "*any* of its computers with Internet access" during "*any use* of such computers," 20 U.S.C. §§ 9134(f)(1)(A), 9134(f)(1)(B) and 47 U.S.C. §§ 254(h)(6)(B), 254(h)(6)(C) (emphasis added). Thus, the law requires libraries to block speech even on computers and Internet connections wholly paid for with non-federal money. This is unconstitutional under *League of Women Voters*, in which the Court found fatal the fact that the statute did not permit public broadcasting stations "to segregate its activities according to the source of its funding" or "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal

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[9]In addition, because the E-rate and LSTA programs are designed to narrow the "digital divide," *see, e.g.*, J.S. App. 4a, 36a-37a, 130a, CIPA distorts the function of those programs by perpetuating gaps in Internet access among various groups. Under CIPA, those who rely on public libraries for Internet service will have substantially more restricted access to information than will people who have Internet access at home.

funds." 468 U.S. at 400; *see also Rust v. Sullivan*, 500 U.S. 173, 196-97 (1991).[10]

CONCLUSION

Although the judgment below was plainly correct, and would warrant summary affirmance, because this is a case involving important First Amendment principles, appellees do not oppose the government's request for plenary review.

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[10]The government suggests that libraries are "free to establish unfiltered computers at facilities or branches that do not receive assistance under the E-rate or LSTA programs." J.S. at 27 n.6. In the first place, the government's suggestion ignores the unequivocal language of the Act, which plainly requires a library to certify that it has installed filters on "*any* of its computers with Internet access." Nothing in the statutes or regulations governing the E-rate and LSTA programs suggests that smaller "facilities or branches" of public libraries are entitled to receive funding as separate entities independent of the public libraries of which they are a part. More generally, nothing in *League of Women Voters* prevented those who worked at the public broadcasting station from building entirely separate "facilities or branches" with non-federal money; the question was whether they could "use the *station's* facilities to editorialize with nonfederal funds," so long as steps were taken to ensure that the federal money was not used to subsidize the editorializing. 468 U.S. at 400 (emphasis added). Similarly, nothing about the law in *Velazquez* prevented the Legal Services lawyers from opening entirely separate private legal services centers across town from the ones that received federal money, yet that did not save the law.

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October 7, 2002

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